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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-197

ROBERT LEROY STUDER,
Petitioner

v.

STATE OF TEXAS,
Respondent

On Petition for Writ of Certiorari
To The Court of Criminal Appeals
of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner seeks to review the per curiam opinion of the Court of Criminal Appeals of Texas, No. 48,028, decided April 17, 1974. Per curiam opinions of this Court are not reported, but a copy of the opinion is appended to the Petition.

JURISDICTION

The formal jurisdiction requisites would seem to be satisfied; however, Respondent dis-

putes that any right guaranteed by the United States Constitution has been denied to Petitioner.

QUESTIONS PRESENTED

1. Did Petitioner's employed, state trial court attorney provide effective assistance of counsel to Petitioner?

2. If such counsel of Petitioner's choosing was imcompetent, can this ineffectiveness be imputed to the State and be a ground for reversal of the case?

3. Can this Court determine the question of incompetency of counsel, if such incompetency is a ground for reversal, on the record of the case as it now exists?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the right to counsel provision of the Sixth Amendment to the United States Constitution is involved.

Also pertinent are Articles 29.06, 29.07 and 29.08 of the Texas Code of Criminal Procedure. These Articles set out the requirements for motions for continuance filed in the state courts of Texas and are reproduced in the Petition.

STATEMENT OF THE CASE

Petitioner was convicted of fondling a minor

male by a jury and assessed a term of imprisonment of 15 years.

The evidence adduced at the trial showed that Petitioner invited Patrick Elizondo a boy of four, and his sister Elizabeth Elizondo into his house trailer which was located in the same park as the Elizondo Trailer, offering candy as an inducement. Once inside the trailer, Petitioner removed his trousers and pulled down Patrick's pants. Petitioner put his private parts against Patrick's back and placed his hand on Patrick's private parts.

Patrick and Elizabeth left Petitioner's trailer when an older sister, Cynthia Elizondo, came to look for them. Once at the Elizondo trailer, Patrick told his father what had happened. The father, armed with a pistol, attempted to locate Petitioner, but Petitioner could not be found in his house trailer. The father than complained to the Houston police and Petitioner's arrest and trial followed.

After affirmance of the judgment of conviction by the Texas Court of Criminal Appeals, these certiorari proceedings were instituted.

ARGUMENT AND AUTHORITIES

Petitioner asserts that Petitioner's trial counsel was incompetent for failing to comply with the Texas continuance statutes thus generating a trial without defense witnesses. Petitioner also questions his trial attorney's acquiescence in the trial courts ruling that the four year old Patrick was incompetent to testify and the attorneys failure

to call Petitioner as a witness in his own behalf.

1. The Record Before This Court Does Not Support Petitioner's Claim That His Trial Counsel Was Incompetent.

Petitioner was indicted on January 13, 1972. On April 10, 1972, Petitioner's first attorney filed a motion for discovery requesting, in part, the names of witnesses to be called by the prosecution, any written statements of the witnesses and their grand jury testimony. Then, on the 19th of April, the initial attorney applied to the Court for permission to withdraw as counsel for the reason that Petitioner "has employed other counsel to represent him." The motion to withdraw was approved on said date, and a motion for continuance was likewise granted.

Represented by his new attorney, Walter Conway, Petitioner again moved for and was granted a continuance on July 5, 1972. However, at the next setting of the case, on September 5, 1972, Petitioner's third motion for continuance was overruled. As Petitioner asserts, this third motion was statutorily deficient.

This repeated seeking of continuances suggests that such motions were made for delay and not for the stated reason that Petitioner had witnesses that were important to his defense. This conclusion is at least reasonably inferrable from the circumstances of three motions grounded upon the failure of witnesses to attend the court settings. The inference is rendered stronger since at no

time, at the trial on the direct appeal and in the Petition filed in this Court, has Petitioner ever set out the expected testimony of the missing witnesses and attempted to demonstrate the materiality of the testimony.

Likewise, the fact that Petitioner's attorney had not paid his bar dues, Petitioner's decision not to appear as a witness and the acquiescence of his attorney in the court's disqualification of four year old Patrick disclose no evidence of incompetency. First, the fact that the attorney had not paid his state bar dues, without more, does not demonstrate incompetency of counsel. (See Beto v. Barfield, 391 F2d 275 (5 Cir. 1968) Second, there may be many reasons that Petitioner decided against testifying including arguendo, the possibility that he was fearful of cross-examination as to like conduct with the Elizondo's and other children at the trailer park. Such cross-examination would be permitted under Texas law. (See Gephart v. Beto (5 Cir. 1971), 441 F2d 319, Cert.den 40 U.S. 966. Third, the ruling that Patrick's incompetence to testify can be said to be favorable to Petitioner -- one less witness against him. Moreover, the record indicates that the ruling was proper since Patrick did not know his age and did not know the difference "between telling a story and telling the truth."

As above indicated, the circumstances surrounding the trial simply do not support the conclusion that Petitioner's attorney was incompetent or that Petitioner was deprived of the effective assistance of counsel.

2. Arguendo, If Petitioner's Counsel Was Incompetent, Such Deficiency Should Not Be Charged To The State of Texas.

The first eight Amendments to the United States Constitution, the so-called Bill of Rights, apply to federal action or inaction. By operation of the Fourteenth Amendment "No State shall. . . deprive any person of life, liberty or property, with out due process of law; nor deny to any person with in its jurisdiction the equal protection of the laws" the Court has held that the protection and requirements of the first eight Amendments are enforceable in state criminal prosecutions.

It is apparent that a State must, in some way, be a part of the process by which some right guaranteed by the first eight Amendments is denied to a state defendant.

Such is not the case here. Petitioner discharged one attorney and opted for another of his own choosing. The State of Texas had no part in this circumstance, and so cannot be held chargeable or accountable for the Petitioner's decision in hiring his attorney. Howard v. Beto, 375 F.2d 441 (5th Cir. 1967).

While it is lamentable and sometimes sympathy provoking, that defendants may elect to use the services of attorneys who are not as able and knowledgeable as other lawyers, to formulate a rule that a judgment should be vitiated because of the comparative incompetence of employed coun-

sel, would cause chaos in the administration of justice, both criminal and civil (remembering that there can be no deprivation of "property" without due process of law). A defendant need only to hire incompetent counsel for his first entry into courts, knowing that a second trial is in the offing should the first round or trial be decided adversely to him.

Thus, imputing the lack of ability to a State will add to the tangled jungle that already surrounds the criminal trial.

Accordingly, even if Petitioner's hired counsel was incompetent, there exists no constitutional basis for reversing the judgement of conviction.

But

3. Whether Or Not Petitioner's Trial Counsel Was Incompetent, Whether Or Not Such Incompetence Should Be Imputed To The State, The Record Before This Court Does Not Support The Granting Of Judgement Reversal In Certiorari Proceedings.

All that is readily apparent at this stage of the proceedings (aside from several other, but minor, claimed errors) is that Petitioner's attorney filed a motion for continuance which did not meet Texas' statutory requirements and which was overruled by the state trial court.

As noticed above, the inadequate motion

could have been filed only for delay. The witnesses referred to may not have been seriously wanted by the defense. Petitioner may not have been able to satisfy the continuance statute by showing the materiality of their expected testimony.

Even now, Petitioner gives us no reason to suppose that the witnesses referred to in his Motion for Continuance would have been in any way helpful in defending against the State's case.

With record in its present posture, the issuance of a writ of certiorari is inappropriate. Only habeas corpus proceedings, state and/or federal, can properly illuminate the question of the competency of Petitioner's trial attorney.

CONCLUSION

For the reasons advanced above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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John L. Hill
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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been served by placing the same in the United States Mail, postage prepaid, certified, on this the ____ day of October, 1974, addressed as follows: Ben G. Levy, 2244 W. Holcombe Blvd., Houston, Texas, 77025.

LONNY F. ZWIENER
Assistant Attorney General